Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,

Petitioners,

vs.

WILLIAM MURPHY, Acting Director Department of Mental Health and Developmental Disabilities; ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

No. 94-1764

WAYNE NELSON and ANTHONY MANOS,

Plaintiffs-Appellants,

v.

WILLIAM MURPHY, Acting Director of the Department of Mental Health and Developmental Disabilities, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 3920—John A. Nordberg, *Judge.*

ARGUED OCTOBER 25, 1994—DECIDED JANUARY 4, 1995

Before CUDAHY, ESCHBACH, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* When a jury in Illinois returns a verdict of not guilty by reason of insanity, the criminal court commits the defendant for a mental examination. 730 ILCS 5/5-2-4(a). If after receiving the results of this examination the judge decides that the person is mentally ill and dangerous, the judge must order the person confined "in a secure setting". *Ibid.* "Such defendants placed in a secure setting shall not be permitted outside the facility's housing unit unless escorted". *Ibid.* Notwithstanding this command, a court may permit a confined

person to move freely on and off the facility's grounds. Every 60 days the director of the mental health facility "shall file a treatment plan with the court. . . . Such plan may . . . include unsupervised on-grounds privileges, off-grounds privileges (with or without escort . . .), home visits and participation in work programs". 730 ILCS 5/5-2-4(b).

Wayne Nelson and Anthony Manos were found not guilty by reason of insanity. Nelson had been charged with murder, Manos with attempted murder. Each was found mentally ill and dangerous, ordered confined "in a secure setting", and sent to the Elgin Mental Health Center. On the recommendation of a treatment plan, both received passes for on- and off-grounds travel. In December 1988 the criminal court approved a treatment plan that permitted Nelson to move on-grounds from one activity to another, and to leave the grounds on supervised travel twice a month (but not to visit his home). In January 1988 the criminal court approved a treatment plan that gave Manos similar on-grounds privileges, and in September 1989 the court granted Manos's motion for supervised off-grounds travel (but he, too, was not to visit his home).

In May 1990 two persons confined at Elgin escaped while traveling on off-grounds passes. William Murphy, then the director at Elgin, concluded that security needed improvement. He canceled all off-grounds passes and curtailed unescorted movement within the grounds while the facility constructed a fence. Treatment plans duly filed with the criminal court described this change. Neither Nelson nor Manos complained to the state court—although other inmates did, and some of them obtained judicial relief. Instead, in December 1990 Nelson and Manos filed suit in federal court under 42 U.S.C. §1983, contending that the reduction of their privileges violated the due process clause because it was a response to a breach of security rather than an outgrowth of an individual evaluation. See *Youngberg v. Romeo*, 457 U.S. 307 (1982). Litigation is proper under §1983, rather than 28 U.S.C. §2254, because the scope of passes may be understood as a condition of confinement. See *Graham v. Broglin*, 922 F.2d 379 (7th Cir.

1991) (request for placement in a work release program may be adjudicated under §1983).

Plaintiffs believe that the due process clause forbids any decisions applicable across the board to all inmates. They sought injunctive relief and damages on behalf of a class of all persons confined at Elgin after acquittal by reason of insanity. The fence was completed in March 1991, but on-grounds unsupervised travel has not been fully restored; most inmates' movement is supervised. In March 1994 the district court dismissed the suit without prejudice to its renewal in state court, concluding that abstention is appropriate. 1994 U.S. Dist. LEXIS 2896.

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed. R. Civ. P. 23(c)(1). This case was active on the district court's docket for three years and four months, but despite two motions for class certification and full briefing by the parties the court never decided whether it could be maintained as a class action. The court did not give a reason for this inaction, and we do not perceive one. Prompt decision one way or the other is imperative not only so that the parties know whose interests are at issue but also so that representative plaintiffs with live claims may be substituted. For a properly certified class action survives the mootness of the original representative's claims, while an individual action must be dismissed in identical circumstances. Compare *Sosna v. Iowa*, 419 U.S. 393 (1975), with *Board of School Commissioners v. Jacobs*, 420 U.S. 128 (1975). Both plaintiffs have been released from confinement at Elgin—Manos in December 1990 and Nelson in April 1993. See *People v. Nelson*, 244 Ill. App. 3d 356, 614 N.E.2d 277 (1st Dist. 1993). The district court did not mention these releases, which moot plaintiffs' request for injunctive relief. Although each plaintiff is subject to recommitment for future misbehavior, that possibility was held insufficient to satisfy Article III in *Weinstein v. Bradford*, 423 U.S. 147 (1975), which concluded that release on parole moots a dispute about the procedures the state

uses to make parole decisions. See also *Murphy v. Hunt*, 455 U.S. 478 (1982). A decision on class certification could permit other inmates to carry on the quest for injunctive relief, *Parole Commission v. Geraghty*, 445 U.S. 388 (1980), but two considerations counsel against a remand. First, the small size of the putative class (fewer than 85 at all pertinent times) coupled with the fact that each inmate was entitled to (and several received) individual consideration in state court suggests that the conditions for class certification have not been met. Second, Nelson and Manos have a live dispute with the defendants about damages, and our resolution of this dispute shows that class certification would be imprudent.

The district court abstained under the principles of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* held that a federal court should abstain when the federal case depends on the resolution of unsettled questions of state law within the competence of an administrative agency—in *Burford* itself, an agency regulating the oil industry. Plaintiffs observe that directives affecting passes from a single state mental facility are some distance from a statewide program of oil and gas regulation, and they add that nothing in this case depends on the resolution of an unsettled question of state law. The district court conceded all this but thought *Burford* applicable because the rules governing the treatment of mentally ill persons are important to the state. Although Illinois does not handle these matters through an agency with statewide power, or even a court of specialized jurisdiction, the district judge thought that the criminal court supervising each person's custody specializes in the details of that case: "While the Illinois circuit courts can hardly be said to [be] courts of technical specialization, in this instance they are courts of individual specialization."

Plaintiffs see this as proof that *Burford* cannot apply. No agency, no *Burford* abstention. This oversimplifies matters. Five years ago the Court recapitulated the *Burford* doctrine:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. New Orleans, 491 U.S. 350, 361 (1989) (*NOPSI*) (citations omitted). This language suggests that *Burford* is limited as plaintiffs propose. Yet two years ago the Court suggested that the *Burford* doctrine might justify abstention in a domestic relations case otherwise within the diversity jurisdiction, when a state court is available to resolve difficult questions of state law. *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2216 (1992). If *Burford* abstention might be apt in a domestic-relations dispute, an agency's role cannot be essential.

Still, it is hard to fit this dispute within *Burford*. Its outcome does not depend on the answer to some unsettled issue of state law. And far from using a single agency or specialized court to "establish a coherent policy with respect to a matter of substantial public concern", Illinois has divided responsibility among the many criminal courts throughout the state. A decade ago, when a state judge issued an injunction governing the handling of escape risks at mental institutions, the Supreme Court of Illinois reversed on the ground that each judge supervising a person in custody after an insanity acquittal is entitled to consider the subject independently. *People v. Roush*, 101 Ill. 2d 355, 462 N.E.2d 468 (1984). *Roush* establishes that Illinois does not seek a uniform policy toward all persons situated similarly to plaintiffs, which makes the *Burford* doctrine inapplicable.

In the district court defendants relied not only on *Burford* but also on *Younger v. Harris*, 401 U.S. 37 (1971). The district court thought *Younger* irrelevant "because plaintiffs do not seek to enjoin any state court proceeding. It is true plaintiffs seek injunctive relief, but against Illinois' Department of Mental Health, not the Illinois courts." Yet *Younger* itself concerned a request for injunctive relief against the adverse litigant, not against a court or judge. The principle of *Younger* is that a party to a state proceeding affecting important governmental interests must resolve the dispute in the state's preferred tribunal. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). A federal court that simply ignores the pending state case, and resolves the question independently, damages the state interest a little less than a court that enjoins the pending state proceeding to boot, but in either case the principal objection is to the transfer of adjudication from the original state forum to the federal forum. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (treating an injunction against execution of a money judgment rendered by a state court as no better than an injunction against the continuation of the state proceedings).

Illinois requires the criminal court to supervise the confinement of persons found not guilty by reason of insanity. Both Nelson and Manos were active litigants in state court. As we have recounted, Nelson was especially active; he sought and obtained an order releasing him from confinement altogether in 1993. Every 60 days the staff of Elgin filed a new treatment plan with the court for each plaintiff. These plans recounted the limitations on passes. Either plaintiff could have opposed the implementation of the new plan on constitutional grounds—or on the ground that the change in the pass policy violated the orders approving earlier treatment plans and thus constituted contempt of court. No one doubts that the state courts had jurisdiction to consider the precise constitutional claims that have been raised in this litigation. The

cases pending in the courts of Illinois are continuations of the original criminal prosecutions, and preserving a state's right to litigate criminal cases in its own courts is the core of the *Younger* doctrine. Instead of presenting objections to the treatment plans, plaintiffs filed an independent suit in federal court. Their briefs imply that they made this choice because they were dissatisfied with the relief that state courts had afforded to other inmates at Elgin. But the limited relief may reflect not any restrictions on the state tribunal's power, or any unwillingness to entertain constitutional claims, but the shakiness of plaintiffs' arguments on the merits. We do not share plaintiffs' apparent view that dissatisfaction with state courts' handling of an issue justifies carting one's claim off to federal court.

There are exceptions to the *Younger* principle, but plaintiffs do not contend that any is applicable; they rest with the district court's conclusion that by not seeking an explicit injunction against the state court's role they have avoided *Younger*, and that conclusion is incorrect. Plaintiffs' litigation strategy creates another potential argument. Because they have been released, plaintiffs are not *now* litigants in active criminal proceedings; the staff at Elgin does not file new treatment plans, and there is no state forum in which plaintiffs may litigate their defenses to the details of these plans. But the Supreme Court long ago held that parties may not avoid *Younger* by withholding defenses from the state proceeding and commencing the federal suit as soon as the state case ends. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975).

"Federal post-trial intervention, in a fashion designed to annul the result of a state trial, . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction." *Id.* at 609 (footnote omitted). See also *NOPSI*, 491 U.S. at 369. What *Huffman* decried is, however, exactly what plaintiffs want. Treatment plans to which they made no objection in the state tribunals supervising their

treatment were put into effect; then plaintiffs sought to annul this result in federal litigation. *Younger* bars such a step.

Heck v. Humphrey, 114 S. Ct. 2364 (1994), holds that a prisoner may not obtain damages for allegedly unconstitutional conviction or imprisonment unless the conviction or sentence has been reversed—a step that for state prisoners entails exhaustion of state remedies under 28 U.S.C. §2254. *Younger* supports a complementary holding for conditions of confinement that are actively supervised by state courts. This is not at all to create an exhaustion requirement for conditions-of-confinement litigation under §1983. *Felder v. Casey*, 487 U.S. 131, 147-48 (1988), and *Patsy v. Board of Regents*, 457 U.S. 496 (1982), hold that there is none. But it is to say that an inmate already participating in state litigation must make his stand there rather than attempt the equivalent of federal-defense removal by filing an independent §1983 suit. Actually these plaintiffs are attempting state-defense removal too, arguing that the revocation of the passes violated the courts' earlier orders approving treatment plans that provided for passes. Violation of a state court's order is contempt of court, not a violation of the Constitution. *Pacelli v. deVito*, 972 F.2d 871, 876 (7th Cir. 1992). By stressing the tension between defendants' directives and the orders of the state courts, plaintiffs make pellucid the fact that their arguments should have been presented to the state courts.

We know from *Deakins v. Monahan*, 484 U.S. 193 (1988), that when *Younger* requires equitable arguments to be presented to state courts, claims for monetary relief also are stayed—but should not be dismissed outright if the claims for damages cannot be redressed in the state proceeding. Plaintiffs have not argued, however, that their claims for money damages lie outside the competence of the state courts that supervised their confinement. Illinois does not maintain a separate system of criminal courts; criminal cases (and subsequent disputes about confinement and treatment) are heard by judges of the circuit courts, which possess general jurisdiction. If a single wrong leads

to both equitable relief and damages, judges of the circuit courts are empowered to provide both remedies. The judge not only could have ordered the restoration of passes but also could have made a monetary award for the period between their revocation on May 30, 1990, and the date of their restoration. Because the state courts were empowered to award both equitable and monetary relief, *Younger* obliged plaintiffs to make all of their arguments there. Any other approach would tolerate exactly the sort of end run that *Huffman* forbids.

Younger is hardly the only doctrine designed to protect state forums. Res judicata (claim preclusion) and collateral estoppel (issue preclusion) are fully applicable under §1983, *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), and may have undercut plaintiffs' claims. They had an opportunity to litigate, and their failure to oppose approval of the treatment plans does not avoid the fact that they *were* approved. *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 704-05 (7th Cir. 1987) (Illinois law). Preclusion is, however, an affirmative defense, which the defendants did not invoke. See David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317 (1977). Nelson and Manos might have been able to avoid issue preclusion because their very quiescence in the state proceedings meant that the approval was uncontested, and issue preclusion rests on the disposition of a contested element of the claim. Then there is the *Rooker-Feldman* doctrine, which establishes that aggrieved litigants may not use §1983 to contest the outcome of state litigation. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Plaintiffs avoid this rule, however, because they challenge the alteration of their passes independently of the courts' approval of that alteration. *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993). *Younger* and *Huffman* complete the picture. Even when res judicata, *Rooker-Feldman*, and the exhaustion doctrine of §2254 are inapplicable, a litigant opposing the state, in state court, on a subject of importance

to the state, must use that forum for resolution of constitutional defenses. Plaintiffs had, and did not use, a state forum in which they could have presented the arguments they now urge. Their deliberate bypass of the opportunity to litigate in state court forecloses them from litigating in federal court. Our conclusion that *Younger* rather than *Burford* supplies the proper ground of decision does not affect the district court's judgment: the complaint must be dismissed.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part.

This is in some respects a puzzling case, but I believe we must start with first principles. It is a grave matter to shut the federal courthouse doors in the face of litigants who present claims over which there is federal jurisdiction. Abstention is "an extraordinary and narrow exception" permissible only in "rare" cases and then only on grounds clearly recognized as adequate by the Supreme Court. *Allegheny County v. Masheda*, 360 U.S. 185, 188 (1959); *see also Trust & Investment Advisors, Inc. v. Hogsett*, No. 93-2117, slip op. at 7 (7th Cir. Dec. 19, 1994).

In the matter before us I think that the district court made bad law out of what may be a hard case. The majority, in an effort to devise a policy for what is at least an unusual case, makes equally bad law. It would require a stretch far beyond any recognized principles to see this as a case for *Burford* abstention and the majority correctly addresses this issue. But, in so doing, it provides an expansive interpretation of *Younger* which would authorize closing the courthouse doors almost at will.

There are several reasons why *Younger* has no application here. First, this is not a case of a federal court

attempting to enjoin a state proceeding. *See Trust & Investment Advisors, Inc.*, slip op. at 8 (*Younger* abstention involves enjoining "judicial or judicial in nature" state proceedings). Here there are at worst potentially parallel proceedings and there is no showing that the federal proceedings will, "damage [ ] the state interest" as the majority suggests.

Second, there are no ongoing or pending state proceedings to be interfered with here. Under Illinois law, the Department of Mental Health (Department) is required to file a treatment plan for each NGRI inmate with the state court every 60 days. That plan, if the Department so chooses, can recommend that an inmate be given on- or off-grounds passes. If the court approves the treatment plan, then the Department may allow the inmates to use their passes. Both plaintiffs in this case had passes originally, but after two inmates escaped from Elgin, those passes were summarily taken away by the Department without any individual review administratively or by the state courts. Passes were also taken away from the other NGRI's. After a security fence was built, some NGRI's were again given passes, but the passes now only allowed movement in the very small area within the fence, and only for a short time.

The majority implies that the plaintiffs have litigated this issue and others relating to their confinement in state court, with plaintiff Manos being so active that he eventually obtained his release. But the Magistrate Judge's findings of fact say that it was the *Department* which submitted a plan that "restored" the new passes to the plaintiffs and which suggested the release of plaintiff Manos. In other words, the plaintiffs were not actively litigating this issue; rather the *status quo* of the Department's suggesting treatment plans and the court's approving them simply continued. The Department decided what to suggest as treatment, and it was the Department which decided to remove passes without individual review, the Department which decided that when it reintroduced passes they would be much more restrictive and the Department

which decided not to suggest any more less-restrictive passes. The plaintiffs are challenging the Department's decision to do away with their court-approved (and less-restrictive) passes, not a decision by the state courts. Their reason for going to federal court may simply reflect a concern that the state courts may too routinely approve the recommendations of Department employees.

It is true that the state courts retain jurisdiction of the inmates at Elgin and must reapprove treatment plans every 60 days. The Department retains some discretion in implementing the plans. It is also true that the Department may not be able to exercise its discretion should the court *order* it to provide all the privileges approved in the plan. But the fact that there may be a state remedy in existence but not invoked is certainly not grounds for *Younger* or any other species of abstention. Not infrequently, federal and state courts may have *jurisdiction* to address similar problems but, unless federal measures disrupt ongoing state proceedings, there are generally no grounds for abstention.

Abstention is for the rare case, and this case surely fits into the federal §1983 jurisprudence. We have also decided similar cases brought by Elgin inmates in this court in the past, and saw no reason to abstain then. For example, in *Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983), individuals found "unfit to stand trial" (USTs) brought a §1983 claim against the Department of Mental Health for its practice of assigning all USTs to a more secure facility, for its failure to allow access to telephones and for unduly restricting the movements of inmates around the facility. In *Maust v. Headley*, 959 F.2d 644 (7th Cir. 1992), an Elgin inmate who had been transferred to the more secure Chester Mental Health Center brought a §1983 claim against the Department of Mental Health, saying that the transfer and visitation restrictions imposed by the Department violated his right to due process. In both of these cases, the plaintiffs' confinement was governed by a statute which required approval of UST treatment plans by the state court, just like the statute at

issue here governing NGRIs. Thus the plaintiffs in *Johnson* and *Maust* presumably had the same "ongoing relationship" with the state courts that plaintiffs here do. Yet in both these cases we reached the merits with no talk of abstention or *Younger*.

I do not therefore agree that *Younger* abstention applies, and I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—1-4-95

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-1764

WAYNE NELSON and ANTHONY MANOS,

Plaintiffs-Appellants,

v.

WILLIAM MURPHY, Acting Director of the Department of Mental Health and Developmental Disabilities, *et al.*,

Defendants-Appellees.

On Petition for Rehearing

DECIDED MARCH 13, 1995

Before CUDAHY, ESCHBACH, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* One of the arguments in the petition for rehearing leads us to elaborate on our initial opinion. *Younger v. Harris*, 401 U.S. 37 (1971), applies to plaintiffs' claim for damages only if the state forum could have entertained a request for damages. We wrote that, in Illinois, "[i]f a single wrong leads to both equitable relief and damages, judges of the circuit courts are empowered to provide both remedies. The judge not only could have ordered the restoration of passes but also could have made a monetary award for the period between their revocation on May 30, 1990, and the date of their restoration." Slip op. 8-9. Plaintiffs insist that this is incorrect—that only the state's Court of Claims may

award damages. If that is so, then *Deakins v. Monahan*, 484 U.S. 193 (1988), entitles plaintiffs to pursue damages in federal court free from any inhibition of the *Younger* doctrine.

The petition for rehearing asserts that "damage claims against the State of Illinois and its employees can only be maintained in the Illinois Court of Claims." The assertion is wrong. That court possesses exclusive jurisdiction of all claims against the state itself, 705 ILCS 505/8, but not of claims against state employees. Illinois deems some suits against employees to *be* suits against the state, and therefore to come within the Court of Claims' exclusive jurisdiction, but the Supreme Court of Illinois makes the same distinction as the Supreme Court of the United States did in *Ex parte Young*, 209 U.S. 123 (1908), and *Kentucky v. Graham*, 473 U.S. 159, 169-70 (1985): suits against a public employee in his official capacity are suits against the state; suits against the employee in his personal capacity are not suits against the state; and a suit seeking damages for misconduct (in particular, for a violation of the Constitution) usually is a personal-capacity suit. The circuit courts, rather than the Court of Claims, possess jurisdiction "when it is alleged that the State's agent acted in violation of statutory or constitutional law, or in excess of his authority". *Healy v. Vaupel*, 133 Ill. 2d 295, 308, 549 N.E.2d 1240, 1247 (1990). See also, e.g., *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 188, 470 N.E.2d 1029, 1038-39 (1984). Plaintiffs allege that their jailers acted in violation of the Constitution of the United States and the laws of Illinois. The circuit court therefore could have awarded damages, if plaintiffs were entitled to that relief on the merits. But plaintiffs never presented their arguments to the state tribunals, and as our original opinion explains they may not disdain opportunities in ongoing state litigation and later seek relief in federal court.

The petition for rehearing is denied. No judge in active service has called for a vote on the suggestion of rehearing en banc, which is rejected.

CUDAHY, *Circuit Judge*, Dissenting.

I dissented in the main case, *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995), from the remarkable conclusion that *Younger* abstention could apply when there was no federal attempt to enjoin a state proceeding, and, in fact, where there was no ongoing or pending state proceeding with which to interfere. There are more fundamental reasons to reject the majority's view here than whether these damage claims may be brought exclusively in the Court of Claims. Therefore, with the utmost respect, I dissent from the present opinion and order and would grant the petition for rehearing.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—3-13-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WAYNE NELSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 90 C 3920
	)	
WILLIAM MURPHY, et al.	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

BACKGROUND

Plaintiffs Anthony Manos and Wayne Nelson were both charged with crimes under Illinois law but found not guilty by reason of insanity. Pursuant to Illinois' Criminal Code, Ill. Rev. Stat. ch. 38, para. 1005-2-4, plaintiffs were separately admitted to the Elgin Mental Health Center, a state-run facility, as forensic patients. Under the terms of § 1005-2-4 the director of the Elgin

Center, a defendant in this case, is required to submit a treatment plan to the court for each forensic patient every sixty days, evaluating the patient's progress and the extent to which they are benefitting from treatment. The treatment plan may also include privileges to move about the grounds of the facility unsupervised, or leave the facility with or without supervision for limited periods of time, provided they have been approved by specific court order. In issuing such an order, the supervising court is entitled to impose such conditions as are deemed necessary to assure the patient's satisfactory progress in treatment, and the safety of the patient and others. Ill. Rev. Stat. ch. 38, para. 1005-2-

4(b). Forensic patients at Elgin Mental Health Center received passes for on or off-grounds privileges only after a thorough, multi-tiered assessment of their propriety in each individual case.

Prior to May 1990, plaintiffs, along with other forensic patients at the facility, had been granted such passes. On May 30, 1990, after two patients escaped through the use of off-grounds passes, all passes of forensic patients at the center were summarily suspended. Plaintiffs have never received another individualized review to determine whether they were still appropriate candidates for passes. Subsequently, the center has issued on-grounds passes which allow forensic patients to move within a fenced-in

space of the facility under supervision, allowing unsupervised movement only for extremely limited periods of time.

Plaintiffs have filed suit against defendants, the director and associate director of the Illinois Department of Mental Health, and the director of the Elgin Mental Health Center, alleging the suspension of their passes, without any subsequent hearing to determine the appropriateness of the suspension, violates their rights under the Due Process Clause. Plaintiffs have asked for monetary and injunctive relief.

PROCEDURAL HISTORY

This case was initially assigned to Judge Bua. At its inception, plaintiffs moved for certification of a class of

all individuals admitted to Elgin Mental Health Center pursuant to § 1005-2-4 in possession of on or off-grounds passes which were revoked on or about May 31, 1990. Plaintiff's motion for class certification is still pending before the court. Plaintiffs had also moved for a preliminary injunction restoring all passes suspended at the end of May 30, 1990, and prohibiting future suspensions of passes for periods of greater than 72 hours without a judicial hearing. In their response to plaintiffs' motion, defendants raised the question of whether abstention was appropriate in this case under either *Younger v. Harris*, 401 U.S. 37 (1971), or *Burford v. Sun Oil*, 319 U.S. 315 (1943). Judge Bua referred those

portions of the motion addressing the factual basis for a preliminary injunction to Magistrate Judge Pallmeyer.

The magistrate judge held an evidentiary hearing and issued a report and recommendation concluding that plaintiffs were entitled to a preliminary injunction. A search of the official case record reveals that the abstention question has yet to be resolved. Pragmatism dictates the court address it now.

ANALYSIS

Lack of subject-matter jurisdiction is never waivable. *U.S. v. Stillwell*, 900 F.2d 1104, 1110 (7th Cir. 1990); *cert. denied*, 498 U.S. 838 (1990). The court may examine the question of its

jurisdiction and dismiss an action, be it via the suggestion of the parties or otherwise, at any time. Fed. R. Civ. P. 12(h)(3).[1] Consideration of defendants' motion to abstain from the exercise of jurisdiction is therefore appropriate despite the passage of time since the filing of this case, and its progress on the merits. Further, it is more than appropriate, it is necessary. A judge has no power to decide a case over which he lacks subject-matter jurisdiction. *Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 814 (1992).

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[1] In any event, it can not be argued that defendants waived this issue by failing to base an objection to the report and recommendation on this ground, because the issue of abstention was never before the magistrate judge for consideration.

The federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817 (1976). Abstention from the exercise of such jurisdiction is the exception, not the rule. *Id.*, at 813. Defendants nevertheless suggest that two of the four permissible forms of abstention are appropriate here. First, defendants suggest that the court should refrain from the exercise of jurisdiction under *Younger* abstention, which indicates a federal court should abstain from exercising its jurisdiction when it has been invoked to restrain a state criminal proceeding. Although *Younger* abstention may be applied to suits to

enjoin state civil proceedings if the state's interest in the proceeding is important enough to implicate federal-state comity, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *see also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975), it is inapplicable here because plaintiffs do not seek to enjoin any state court proceeding. It is true plaintiffs seek injunctive relief, but against Illinois' Department of Mental Health, not the Illinois courts.

Defendant's second assertion, that *Burford* abstention applies, presents an altogether more serious basis for declining jurisdiction. *Burford* abstention is appropriate either where the court is presented with difficult questions of state law bearing on policy

problems of substantial import whose importance transcends the result in the case at bar, or where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Colorado River*. 424 U.S. at 814. This case presents a claim for the second type of *Burford* abstention.

The burden of the circumstances requiring *Burford* abstention lies with the proponent of abstention. *Property & Casualty Insurance Limited v. Central National Insurance Company of Omaha*, 936 F.2d 319, 326 (7th Cir. 1991). The presence of federal question jurisdiction may raise the level of

justification needed for abstention, *Colorado River*, 424 U.S. at 815, n. 21, but it does not preclude abstention. *See also* *New Orleans Public Services, Inc. v. Council of City of New Orleans* *("NOPSI")*, 109 S. Ct. 2506, 2516 (1989) (mere assertion of a federal constitutional challenge along will not compel exercise of jurisdiction). Indeed, one of the bases for jurisdiction in *Burford* was a claim under the Due Process Clause of the Fourteenth Amendment. *Burford*, 319 U.S. at 317.

In *NOPSI*, a suit over an electric utility's decision to participate in a nuclear power plant venture, no state law claims existed or were implicated in the suit. Nevertheless, the Supreme

Court upheld the decision of the Fifth Circuit that this was not fatal to *Burford* abstention, which could be based on reluctance to intrude into a complex regulatory scheme of paramount local concern which demands local expertise. *NOPSI*, 109 S. Ct. at 2514. Instead, the court declined to exercise *Burford* abstention on the basis that taking jurisdiction would not disrupt state efforts at uniform treatment of a local problem because a bare facial inquiry indicated that federal preemption applied. *Id.*, at 2515. These circumstances are not applicable here.

Factors to be considered in determining whether to apply *Burford* abstention include 1) whether the suit is based on a cause of action which is

exclusively federal, 2) whether difficult or unusual state laws are at issue, 3) whether there is a need for coherent state doctrine in the area, and 4) whether state procedures indicate a desire to create special state fora to adjudicate the issues presented. *General Railway Signal Co. v. Corcoran*, 921 F.2d 700, 709 (7th Cir. 1991). The last of these factors has more recently been elevated to the level of a prerequisite for abstention. That is, the state must provide a forum which stands in a special relationship to technical oversight or concentrated review to evaluation of the claims at issue. *Property & Casualty Insurance*, 936 F.2d at 323.

The court finds that defendants have met this prerequisite. A circuit court judge maintains jurisdiction over a patient he or she commits to a mental institution pursuant to § 1005-2-4. *People v. Roush*, 101 Ill.2d 355, 462 N.E.2d 468, 472 (1984). This jurisdiction continues even after the expiration of a term of a conditional release, Ill. Rev. Stat. ch. 38, para. 1005-2-4-(h). *People v. Butler*, 194 Ill. App.3d 297, 550 N.E.2d 1250, 1253 (1 Dist. 1990). Further, the clear intent behind the provision of §§ 1005-2-4(b)&(h), requiring submission of regular treatment plans to the court and providing for orders of conditional release, was to enable the circuit court judge to monitor the progress in

treatment of defendants committed under this section, and to give the court authority to direct the Department of Mental Health in performing its duties in this regard. *People v. Valdez*, 79 Ill.2d 74, 402 N.E.2d 187, 193 (1980). While the Illinois circuit courts can hardly be said to courts of technical specialization, in this instance they are courts of individual specialization. The system of judicial oversight erected by § 1005-2-4 provides that treatment and commitment decision for a defendant under the section are reviewed by judges intimately and continuously involved with the facts of that particular case. This is sufficient to constitute the kind of technical oversight contemplated by the *Property & Casualty Insurance*

court.

Turning to the other factors employed in deciding questions of *Burford* abstention, the state and federal courts have concurrent jurisdiction over plaintiffs' due process claim.[2] On the other hand, Illinois law on the commitment of defendant found not guilty by reason of insanity is neither difficult nor unusual, although as discussed supra, *NOPSI* shows that this is not particularly crucial. Hence, application of *Burford* abstention turns on the existence of Illinois need for coherent doctrine in the area of the

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[2] Rather than being merely a factor in deciding whether to apply *Burford* abstention, the existence of concurrent jurisdiction should be a prerequisite as well.

treatment of § 1005-2-4 defendants.

When inquiring into the substantiality of a state's interest in its proceedings, the court does not dwell on the state's interest in the outcome of a particular case, but on the importance of the generic proceedings to the state. *NOPSI*, 109 S. Ct. at 2516. In this case, the state of Illinois' purposes in enacting § 1005-2-4 were to protect society from potentially dangerous mentally ill persons and protect these persons from themselves, to treat them for their illness, and to prevent them from being institutionalized indeterminately. *People v. Winston*, 191 Ill. App.3d 948, 548 N.E.2d 406, 414 (1 Dist. 1989), *disapproved on other grounds People v.*

Palmer, 148 Ill.2d 70, 592 N.E.2d 940 (1992); *People v. Williams*, 140 Ill. App.3d 216, 488 N.E.2d 649, 653 (1 Dist. 1986); *People v. Larson*, 132 Ill. App.3d 594, 478 N.E.2d 439, 444 (1 Dist. 1985), *disapproved on other grounds* *People v. Palmer*, 148 Ill.2d 70, 592 N.E.2d 940 (1992); *People v. Hampton*, 121 Ill. App.3d 273, 459 N.E.2d 985, 987 (1 Dist. 1983). These are certainly interests of substantial importance. Further the state has created a system of supervision of § 1005-2-4 defendants which prohibits major changes in a defendant's treatment plan or status without individual review by a judge already familiar with the history of that defendant.

In *Roush*, the Illinois Supreme

Court reviewed two lower court decisions concerning the same problem presented here, the escape of § 1005-2-4 defendants. *See also* People v. Schyve, 112 Ill. App.3d 777, 445 N.E.2d 1261 (1 Dist. 1983). In particular, the facts in the *Roush* case involved an inmate at the Manteno Mental Health Center who escaped while out on an unsupervised on-grounds pass with his parents. The circuit court judge in *Schyve* issued orders requiring the Department of Mental Health to identify all § 1005-2-4 defendants who were dangerous to others, segregate them in a secure area, and given ten days notice to the court before transferring any of them to a less secure area. The Supreme Court held that since the orders were directed

at all patients in Illinois, most of whom had never appeared before the judge and were committed to institutions by other judges, they were invalid. *Roush* case indicates that by seeking generalized injunctive relief in federal court, the very kind of relief *Roush* prohibits, plaintiffs lawsuit disrupts Illinois' efforts to establish a coherent policy in the treatment of § 1005-2-4 defendants.

This result appears to be counterintuitive at first glance, because a general injunction would produce uniform results for all § 1005-2-4 defendants. However in this case, general orders of relief are antithetical to a state system based on individualized review of each patient by

a particular judge.[3] The members of the purported plaintiff class, who are provided counsel by the statute, Ill. Rev. Stat. ch. 38, para. § 1005-2-4, may receive the injunctive relief they seek before the circuit judge who committed them to the Elgin Mental Health Center, with or without raising their due process claim.

Plaintiffs' only rejoinder to this conclusion, raised indirectly in their reply brief to the motion for class certification, is that presentation of the factual issues involved before the appropriate circuit court judge would be

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[3]The irony, of course, is that the gravamen of plaintiffs' due process claim is the alleged lack of such individualized review in defendants' decisions to suspend on and off-grounds passes.

futile because the Department of Mental Health has already indicated they will not comply with any court order reinstating on or off-grounds passes. Plaintiffs only evidence of this allegation is a memorandum from defendant Brelje stating the Department of Mental Health's grounds for the suspension of passes, and opining that issuing unsupervised passes would not be a good idea until a security fence is constructed. This is hardly sufficient evidence that defendants will refuse to comply with an order from the circuit court. Further, the law is clear that defendants cannot do so. *Valdez*, 402 N.E.2d at 193. If they do so wilfully, they may be found in criminal contempt of court. *Roush*, 462 N.E.2d at 472.

Plaintiffs' support for their assertions that they have not waived the opportunity to raise the issues of passes before the state court, or that forensic patients holding passes have not been allowed to use them, is equally unimpressive. Plaintiff Nelson also asserts in an affidavit that he has never waived an opportunity to get back his on or off-grounds passes or told anyone he did not want his passes back. However, affidavit also states that plaintiff declined to participate in a hearing about his passes. Further, the affidavit of Mr. Nelson's attorney at the hearing does not state that the issue of passes has been raised.

The only support for the argument that patients, specifically one Curtis

Littrice, have not been able to use their passes is a statement in Mr. Nelson's affidavit that he has never seen Mr. Littrice leaving the building in which they are both housed. Unless Mr. Nelson spends his days with his face pressed to the window this does not create a particularly strong inference. The absence of an affidavit from Mr. Littrice himself is notable.

CONCLUSION

The court finds that the exercise of its jurisdiction over this case would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. Accordingly, the court abstains from the exercise of jurisdiction. Plaintiffs' complaint is

dismissed without prejudice.[4] Plaintiffs' motions for class certification and for a preliminary injunction are denied as moot.

ENTER:

JOHN A. NORDBERG
United States District Judge

DATED: _____

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[4] The court does not retain jurisdiction over the case, and the parties must look to the state courts to resolve this dispute. Gordon G. Young Federal Court Abstention and State Administrative Law From *Burford to* Ankenbrandt: Fifty Years of Judicial Federalism Under *Burford v. Sun Oil Co.* and Kindred Doctrines, 42 DePaul L. Rev. 859, 870-71 (1993). The only further federal court involvement would be certiorari from the state court proceedings to the Supreme Court. *Id,* at 871, n. 58.

NO. 90 C 3920
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WAYNE NELSON and ANTHONY MANOS, Individually and on behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
WILLIAM MURPHY, Acting Director, Department of Mental Health and Developmental Disabilities; and ROALDA J. ALDERMAN, Facility Director, Elgin Mental Health Center; and TERRY BRELJE, PH.D., Associate Director for Forensic Services, Department of Mental Health and Developmental Disabilities,	)
Defendants.	)

REPORT AND RECOMMENDATION

In May 1990, Plaintiffs Wayne Nelson and Anthony Manos were "forensic patients" at the Elgin Mental Health Center, a state-run mental health facility. Forensic patients are persons

charged with or convicted of a crime who have been committed to the care of the state because of a judicial determination that they are not fit to stand trial or not guilty by reason of insanity. Despite this status, prior to May 1990, Nelson and Manos, as well as other forensic patients, were granted court-approved passes to walk without supervision for limited periods on the grounds of the Elgin facility ("grounds passes") and to travel with others for limited periods away from the facility ("off -grounds passes"). On May 30, 1990, state officials abruptly suspended the passes for all forensic patients. Nelson and Manos bring this action on behalf of themselves and similarly situated forensic patients against

directors of the Illinois Department of Mental Health and Developmental Disabilities (hereinafter, "DMHDD" or "the Department"), challenging the department's decision to suspend passes as a deprivation of liberty without due process.[5]

Plaintiffs' complaint, brought pursuant to 42 U.S.C. § 1983 ("Section 1983") sounds in three counts. Count I alleges a deprivation of Plaintiffs'

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[5] Plaintiffs seek to represent a class of forensic patients who enjoyed grounds passes and off-grounds passes prior to May 31, 1990, but the class has not been certified, nor has the class certification motion been briefed. Moreover, the motion for class certification has not been referred. Therefore this report addresses only individual Plaintiffs' claims for relief, but recognizes that much of what is concluded here may well be applicable to circumstances involving other forensic patients.

statutory right to treatment in the "lease restrictive environment" as a result of Defendants' failure to provide Plaintiffs with a hearing individualized determination, or professional judgment regarding whether they continued to qualify for a grounds pass or an off-grounds pass prior to the suspension of their pass privileges. Count II asserts that Plaintiffs were deprived of their statutory right to adequate and humane services pursuant to an individualized treatment plan when Defendants failed to provide them with an individualized determination based upon professional judgment that they no longer qualified for the passes. Count III alleges a deprivation of Plaintiffs' constitutional right to freedom from

unreasonable restraint resulting from Defendants' decision to suspend the pass privileges without exercise of a qualified professional judgment.

On November 15, 1990, District Judge Nicholas J. Bua referred the case to Magistrate Judge Joan B. Gottschall for a report and recommendation on Plaintiffs' motion for preliminary injunction.[6] In January 1991, Plaintiffs moved to compel responses to

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[6] In his minute order dated November 15, 1990, Judge Bua directed that the parties present evidence at a hearing before the magistrate judge on a number of specific issues, including the procedures for obtaining or for revoking a grounds or off-grounds pass; whether any passes had been reinstated; and the extent to which Elgin residents are permitted on the grounds without passes. The court expressly reserved ruling on Plaintiffs' motion for class certification pending the magistrate judge's report and recommendation on the preliminary injunction motion.

EDITOR'S NOTE

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discovery requests. On October 10, 1991, the referral was transferred to these chambers. Defendants did not comply fully with outstanding discovery until directed to do so by this court in January 1992. Parties presented evidence on Plaintiffs' motion for preliminary injunction on June 3 and 4, 1992, and submitted post-hearing memoranda on June 22, 1992.

Before the court is Plaintiffs' motion for a preliminary injunction requesting that this court issue an order which restores to Plaintiffs all passes suspended on May 30, 1990 and enjoins defendants from suspending such passes in the future in the absence of a predeprivation hearing which complies with due process.

FINDINGS OF FACT

Evidence presented at a two-day hearing in June 1992 supports the following findings:

1. Elgin Mental Health Center ("Elgin") is a facility of the Illinois DMHDD that houses approximately 300 forensic residents. The forensic unit at Elgin is composed of individuals found not guilty by reason of insanity ("NGRI") and/or unfit to stand trial ("UST").

2. At all relevant times, Defendant William Murphy was the Director of the Illinois DMHDD. Defendant Terry Brelje was the Associate Director for Policy and Special Programs of the DMHDD. Defendant Roalda Alderman was the Facility Director at Elgin.

3. At all times relevant to this motion, named Plaintiffs Wayne Nelson and Anthony Manos were confined to Elgin as unfit to stand trial or as not guilty by reason of insanity. Under Ill. Rev. Stat. ch. 38 ¶ 104-17, a defendant unfit to stand trial by reason of mental disability "shall be placed in a secure setting" in the custody of DMHDD. Under Ill. Rev. Stat. ch. 38 ¶ 1005-2-4, a defendant found not guilty by reason of insanity and in need of mental health services likewise "shall be placed in a secure setting" in the custody of DMHDD. Manos was committed as UST from January 1986 and as NGRI from October 1986. Nelson was committed as NGRI in October 1986. Both Nelson and Manos were placed in the forensic unit at Elgin.

4. Illinois law requires that the DMHDD file a treatment plan for each forensic patient every 60 days with the court. Ill. Rev. State. ch 38, ¶ 1005-2-4(b). The statute provides expressly that the plan may include pass privileges, "but only where such privileges have been approved by specific court order, which order may include such conditions on the defendant as the Court may deem appropriate and necessary to reasonably assure . . . progress in treatment and the safety of the defendant and others." *Id.*

5. Ernest Marquez, the Assistant Facility Director responsible for administering the forensic treatment program at Elgin, described the following DMHDD procedures for

requesting a court-authorized grounds pas or off grounds pass for a forensic patient. First the patient's treatment team (consisting of the patient's unit director, a psychiatrist, psychologist, social worker, and other nursing or paraprofessional staff) reviews records and considers the appropriateness of pass privileges for a particular patient in light of the team's knowledge of, and experience with, that patient. If the team determines that a pass is appropriate, then a staff member prepares a packet of information for review by Dr. Marquez. If Dr. Marquez approves the request for a pass, he in turn submits the package to Defendant Roalda Alderman, the Facility Director. Following her review, the materials are

submitted to the Department's Associate Director, Defendant Brelje. Upon Dr. Brelje's approval, the packet of materials is returned to the facility, where, under Ms. Alderman's direction, the materials are used for preparation of a court petition. A judge of the Circuit Court must review and approve the petition before a pass is issued for any forensic patient.

6. Plaintiff Anthony Manos, a graduate of the University of Illinois who served in Army ROTC, was admitted to Elgin as unfit to stand trial in January 1986. Six months later, Mr. Manos was found not guilty by reason of insanity and returned to Elgin in October 1986. In January 1988, following the procedures described above, Defendant

Alderman submitted a petition to the Circuit Court of Cook County seeking approval of a grounds pass for Plaintiff Manos. In February 1988, the Circuit Court issued an order granting Manos a grounds pass. Manos used this pass to be on the grounds of Elgin unaccompanied for gradually increasing periods of time. His longest periods spanned up to three hours, during which he went to the commissary or the workshop, or engaged in various educational, social and recreational activities. Manos testified that his pass helped him to maintain and establish family relationships. Specifically, he used his grounds pass to visit weekly with his parents in a cafeteria at Elgin. Further, while exercising his pass

privileges in 1988, Manos met Linda Turner, a non-forensic patient, whom Manos plans to marry in 1993. At the preliminary injunction hearing, Manos recalled crying with joy when he first received his pass. He testified to his "good memories" of "many, many times on the grounds" at Elgin exercising pass privileges.

7. In March 1990, Defendant Alderman petitioned the Circuit Court of Cook County for approval of an unsupervised off-grounds pass for Manos. As described earlier, the request was reviewed first by staff, then by Dr. Marquez, and finally by Dr. Brelje. The Circuit Court issued an order authorizing an off-grounds pass for Manos. This pass permitted Manos to be

off the grounds of Elgin once a week for periods of up to six or seven hours, provided that Manos gave Elgin staff a schedule in advance of is departure. Manos used his off-grounds pass approximately three times a month to visit family members and to go to movies, bowling alleys, and stores.

8. Wayne Nelson is a 1975 high school graduate who was honorably discharged from the United States Air Force in 1979. In 1980, Nelson killed his girlfriend and attempted suicide. Nelson was found not guilty of criminal charges against him by reason of insanity and was committed to the forensic unit at Elgin in 1986. In November 1988, following the procedures describe above, Defendant Alderman

proposed to the Circuit Court that Plaintiff Nelson be given both a grounds pass and supervised off-grounds pass. The Circuit Court issued an order granting Nelson the passes on December 20, 1988.

9. The grounds pass permitted Nelson to be on the grounds of Elgin unaccompanied for periods of up to one hour at a time and allowed Nelson to go to the commissary, library, and education center. The grounds pass also allowed Nelson to participate in other recreational and social activities such as walking, jogging, bike riding, guitar playing, and meeting with friends. Nelson utilized his off-grounds pass to visit family, go to movies, and attend social events at the

V.F.W.

10. Approximately 80 patients at Elgin had grounds or off-grounds passes on May 30, 1990. Each of these passes had been issued only after all of the procedures described above had been satisfied -- in other words, the Circuit Court issued each pass only after recommendations had been supplied by treatment staff. Dr. Marquez, Dr. Brelje, and Director Alderman.

11. In May 1990, two persons acquitted by reason of insanity escaped from Elgin during the exercise of their pass privileges. Although one was apprehended quickly, another remained at large and has not to date been apprehended. Only days before his escape, this second individual had

warned Elgin staff of his intention to leave. In spite of the warning, no action was taken to suspend this individual's pass privileges. The escapes generated a large amount of negative publicity for DMHDD. Within a couple of days of the escapes, Defendant Murphy met with other members of the DMHDD staff, including Defendant Brelje. Murphy concluded that staff determinations regarding pass privileges were not guided by any "set criteria," and that the forensic treatment program should now become a "separate freestanding program." Murphy decided to suspend all grounds and off grounds pass privileges for all forensic patients, effective May 30, 1990. Plaintiffs Nelson and Manos, and

approximately 80 other NGRI' or USTs, lost their pass privileges.

12. It is undisputed that prior to suspending the passes, state officials made no individualized determination that Nelson, Manos, or any of the other insanity acquittees were no longer appropriate candidates for the passes. In fact, state officials did not conduct a hearing of any kind to determine whether Plaintiffs remained qualified to exercise pass privileges. It is undisputed that no deterioration in either Manos' or Nelson's mental health condition had been observed prior to the suspension.

13. Subsequent to the suspension of passes, after years of effort, Defendant Alderman received funding

authorization for construction of a fence around the Elgin forensic unit in the summer of 1990. DMHDD completed construction of the fence which enclosed the Forensic Treatment at Elgin in March 1991. Beginning in March 1991, some members of the proposed Plaintiff class were issued new "grounds passes" which allowed them to be outdoors yet still within the enclosed area, an area approximately one-tenth the size of the 80-acre Elgin facility. Even within the fenced-in area, however, the movement permitted by these new passes is far more restrictive than that permitted under the passes suspended on May 30, 1990 ("old passes"). The new passes restrict Plaintiffs to the enclosed area and do not permit them to be

unsupervised even within the enclosed area for more than five minutes. Prior to the preliminary injunction hearing, even state officials themselves were unaware that patients have new grounds passes are not permitted to walk freely on fenced-in grounds. The restrictions which the new passes place on Plaintiffs' freedom of movement contrast starkly with the freedom Plaintiffs enjoyed under their old passes, under which Plaintiffs were free to roam the 80-acre Elgin campus without supervision. The only liberty now accorded to an inmate holding a new pass that is not accorded to an inmate without such a pass is that the pass holder may walk from one building to another, within the fenced-in area (a

five-minute walk), without escort.

14. Beginning in July 1990, staff at Elgin reviewed patient records for each of the forensic patients who had enjoyed pass privileges prior to May 1990. Defendants concluded that both Plaintiffs Nelson and Manos should have their passes restored once the fence was constructed. As of the date of the preliminary injunction hearing, no members of the proposed class enjoy the freedoms they exercised under the old passes.

15. In December 1990, the Elgin Mental Health Facility released Plaintiff Manos pursuant to a petition filed by Department personnel. At some time prior to the preliminary injunction hearing, staff at Elgin proposed that

Plaintiff Nelson also be conditionally released.

DISCUSSION

Standards for Preliminary Injunctive Relief

A district court must consider four factors in deciding whether a preliminary injunction should be granted. These factors are:

1. whether plaintiff has a reasonable likelihood of success on the merits;

2. whether plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue;

3. whether the threatened injury to plaintiff outweighs the threatened harm the injunction may inflict on defendant;

4. whether the granting of the preliminary injunction will disserve the public interest.

Kellas v. Lane, 923 F.2d 492 (7th Cir. 1990); *Faheem-El v. Klincar*, 841 F.2d 712, 716 (7th Cir. 1988). The "likelihood of success" factor is a threshold inquiry; a finding against Plaintiffs will obviate the need for further analysis. *Adams v. Attorney Registration and Disciplinary Comm'n*, 801 F.2d 968, 971 (7th Cir. 1986) (quoting *O'Connor v. Board of Educ.*, 645 F.2d 578, 580 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981)). In this case, the central inquiry for determining Plaintiffs' likelihood of success is whether they have a liberty interest in the passes which were summarily revoked on May 30, 1990.

Plaintiffs argue that they have three protected liberty interests in the

passes. First, Plaintiffs contend that they have a liberty interest in receiving treatment in the "least restrictive environment." (Complaint, ¶ 27.) Second, Plaintiffs assert a liberty and/or property interest in "adequate and humane care and services pursuant to an individual services plan" (Complaint, ¶ 32.) Third, Plaintiffs argue for a liberty interest in "freedom from unnecessary restraint." (Complaint, ¶ 35.)

A. Do Plaintiffs Have a Protected Liberty Interest?

1. Least Restrictive Environment

A state statute creates a protected liberty interest when that interest is defined by mandatory language and a substantive standard. *Hewitt v. Helms*,

459 U.S. 460, 471-72 (1983) (Pennsylvania statutes and procedures setting forth procedures for confining an inmate to "administrative separation" created liberty interest in inmates remaining in the general prison population); *Woods v. Thieret*, 903 F.2d 1080, 1082 (7th Cir. 1990). In Count I, Plaintiffs contend that a liberty interest in receiving treatment in the least restrictive environment is created by Ill. Rev. Stat. ch. 91.5, ¶ 2-102(a), which states that "a recipient of services shall be provided with adequate and humane care and services in the least restrictive environment." In support of Count I, Plaintiffs rely on *Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983).

In *Johnson*, criminal defendants who were found unfit to stand trial challenged DMHDD's practice of assigning all male USTs to the Chester Mental Health Center ("Chester"), a maximum security facility "significantly more restrictive than some other DMHDD facilities." *Id.* at 1205. Plaintiffs argued that this automatic restrictive assignment violated their due process rights because it was made without any hearing or other individual determination of their treatment needs. *Id.*

Under the Criminal Code, Ill. Rev. Stat. ch. 38, ¶ 104-17(b), the *Johnson* court noted, a criminal defendant found unfit to stand trial because of a mental deficiency could be placed in the

custody of the DMHDD. 701 F.2d at 1206 n.4. In 1977, the DMHDD began the practice of assigning all male USTs to Chester. Seventh Circuit concluded that this practice violated plaintiffs' procedural due process rights because plaintiffs were not provided with a hearing regarding their treatment needs prior to their placement in Chester. *Id.* at 1206-07. Defendants in *Johnson* did not challenge the specific procedures that had been ordered by the district court; thus, the Seventh Circuit's inquiry was limited to the scope of the liberty interest created by the Illinois Mental Health and Developmental Disabilities Code ("Mental Health Code"), Ill. Rev. Stat. ch. 91-1/2 § 2-102 (1981), which provided for

treatment "in the least restrictive environment." 701 F.2d at 1206. The court reasoned that Section 2-102 of the Mental Health Code was applicable to plaintiffs, who, having been remanded to the custody of DMHDD for treatment pursuant to paragraph 104-17(b) of the Criminal Code, are considered "recipients of services" under Section 1-123 of the Mental Health Code. Finally, the court noted that the Illinois legislature intended that the Criminal and Mental Health Codes together would govern a UST's treatment and confinement. The court based this observation on paragraph 104-29 of the Criminal Code, which states that in the event of a conflict with the Mental Health Code, the Criminal Code provision

shall apply. 701 F.2d at 1206. Because Section 2-102 of the Mental Health Code did not conflict with the Criminal Code, USTs were, in the court's judgment, entitled to treatment in the "least restrictive environment." *Id*.

Although the *Johnson* case provides authority for Plaintiffs' argument that state law prohibits Defendants' suspension of Plaintiffs' pass privileges without a hearing, the Seventh Circuit recently diluted the protections provided in Section 2-102. In *Maust v. Headley*, 959 F.2d 644, 648 (7th Cir. 1992), the court held that Section 2-1023 no longer provides forensic patients with a liberty interest in receiving treatment in the least restrictive environment. In

Maust, a criminal defendant found unfit to stand trial claimed that his liberty interest in receiving treatment in the least restrictive environment was violated when he was not granted a hearing prior to his transfer to a more secure mental health center. *Id.* at 646. Invoking *Johnson*, the criminal defendant in *Maust* asserted that Section 2-102 should be construed to create a liberty interest in being confined in the least restrictive setting. *Id.* at 647.

In *Maust*, however, the Seventh Circuit did not agree that Section 2-102 created a liberty interest in the least restrictive environment. The *Maust* court found that amendatory provisions in paragraphs 104-17(b) and 104-31 of

the Illinois Criminal Code, enacted after *Johnson*, eliminated a defendant's liberty interest in the least restrictive environment.[7] *Id.* at 648. Specifically, the amendatory provision in paragraph 104-17(b) provides:

> If the defendant is placed in the custody of the Department of Mental Health and Developmental Disabilities, the defendant shall be placed in a secure setting unless the court determines that there are compelling reasons why such placement is not necessary.

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[7] Because the plaintiffs in both *Johnson* and *Maust* were USTs, paragraph 104-17(b) of the Criminal Code establishes their general treatment plan and paragraph 104-31 governs the extent to which they must be escorted by Department personnel when they are outside a facility building. Ill. Rev. Stat. ch. 38, ¶ 104-17(b) and ¶ 104-31.

Ill. Rev. Stat. ch. 38, ¶ 104-17(b).[8] Examining Section 2-102 of the Mental Health Code in light of 104-17(b) of the Criminal Code, the *Maust* court believed it "highly unlikely that the Illinois General Assembly intended to create a right to be confined in the 'least estrictive, secure environment.'" 959 F.2d at 648. The court also noted that the "degree of supervision" over defendants governed by paragraph 104-31 "would scarcely qualify as that found in the 'least restrictive environment.'"

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[8] Although paragraph 104-17 of the Criminal Code applies only to defendants found unfit to stand trial, the same "secure setting" language is contained in a companion amendment, paragraph 1005-2-4, added after *Johnson*, that applies to defendants found not guilty by reason of insanity. Seventh Circuit's decision in *Maust*, therefore applies to the universe of plaintiffs in the proposed class.

Id.[9] The court then stated that any conflicts between the Mental Health Code and the Criminal Code "must be resolved in favor of the Criminal Code." *Id.* The court based this assertion on Ill. Rev. Stat. ch. 38 ¶ 104-29, which provides that "in the event of any conflict between this Article and the 'Mental Health and Developmental Disabilities Code,' the provisions of this Article shall govern." The court also noted that in the title to the

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[9] Paragraph 104-31 provides in part: "No defendant placed in a secure setting . . . shall be permitted outside the facility's housing unless escorted or accompanied by personnel of the Department of Mental Health and Developmental Disabilities. Nor shall such defendant be permitted any off-grounds privileges . . . or on-grounds privileges, unless such . . . privileges have been approved by specific court order." Ill. Rev. Stat. ch. 38, ¶ 104-31.

legislation amending paragraph 104-17 of the Criminal Code, "the Mental Health Code is expressly listed as one of the statutes affected by the legislation." *Id*.

Plaintiffs cite *Yiadom v. Kiley*, 204 Ill. App.3d 418, 562 N.E.2d 310 (1st Dist. 1990), for the proposition that *Johnson* remains good law. In *Yiadom*, a habeas corpus petition was brought seeking the release from the Department of a defendant found unfit to stand trial. *Id*. at 422, 562 N.E.2d at 312. In considering whether the inmate was denied due process by the Department regarding his treatment plan, the Illinois appellate court cited *Johnson* and observed that "defendants adjudged unfit to stand trial have a state-

created liberty in treatment in the least restrictive environment." *Id.* at 428, 562 N.E.2d at 316. *Yiadom's* precedential value is compromised, however, by the fact that, although the case was decided after the amendments to paragraphs 104-17 and 104-31, there is no mention of these amendments in the court' analysis. *Yiadom* court paid little heed to the issue of whether defendants had a liberty interest in the least restrictive environment. Instead, after citing *Johnson* the *Yiadom* court proceeded directly to a discussion of what process was due. Seventh Circuit in *Maust*, in contrast, engaged in a reasoned analysis of whether defendants retained a liberty interest in the least restrictive environment. *Maust*,

therefore, deserves greater precedential value than *Yiadom*. Under controlling authority, Plaintiffs here appear to have no state-created liberty interest in receiving treatment in the "least restrictive environment," and cannot pursue a claim for injunctive relief to enforce any such interest.

2. Adequate and Humane Care

In Court II, Plaintiffs argue that the suspension of their passes constituted a violation of their state-created liberty interest in receiving adequate and humane care pursuant to an individualized service plan. Paragraph 2-102 of the Mental Health Code provides that "a recipient of services shall be provided with adequate and humane care . . . pursuant to an individual service

plan." Ill. Rev. Stat. ch, 91.5, ¶ 2-102(a). As previously noted, a statute creates a liberty interest when that interest is defined by mandatory language and a substantive standard. *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). Paragraph 20102 satisfied the *Hewitt* standard because it uses mandatory language ("shall") and substantive standard ("adequate and humane care").

Defendants do not dispute that Plaintiffs have a liberty interest in receiving adequate and humane care pursuant to an individualized service plan. Defendants argue, however, that this right was not violated when the passes were suspended.

Illinois does not recognize pass privileges as a mandatory form of mental health treatment. This is evident from the provision authorizing the issuance of passes. Section 1005-2(b) of the Criminal Code provides:

> The defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges . . . unsupervised on-grounds privileges, discharge or conditional or temporary release, except by a plan as provided in this Section . . . such plan may also include unsupervised on-grounds privileges, off-grounds privileges . . . but only where such privileges have been approved by specific court order.

Ill. Rev. Stat. ch. 38 ¶ 1005-2(b). Thus, a defendant may have pass privileges but only if granted by court order. *See generally* People v. Reed, 126 Ill. App.3d 1020, 467 N.E.2d 1158 (2nd Dist. 1984). Where the Illinois

legislature did not make pass privileges mandatory, it could not have intended to make pass privileges a required component of adequate and humane care in Illinois.

The case histories of Nelson and Manos further demonstrate that pass privileges are not required for adequate and humane care at Elgin. Plaintiffs' pass privileges were revoked on May 30, 1990 and have never been reinstated. In the meantime, Manos was released from the custody of DMHDD and Nelson was recommended for conditional release from Elgin to a half-way house. Thus, even without their passes, Manos successfully completed treatment for his mental illness and Nelson has taken a significant step toward completion.

This progress in Manos' and Nelson's mental health demonstrates that they have received adequate and humane treatment without pass privileges. improvement in the named Plaintiffs' mental health, which took place without passes, bears witness to the fact that they did receive adequate and humane treatment. Thus, Plaintiffs' claim that the pass suspension violated their right to receive adequate and humane treatment must fail.

3. **Reasonable Freedom of Movement**

In Count III, Plaintiffs raise their strongest constitutional challenge: they allege that the suspension of their passes violated their constitutional right to reasonable freedom of movement. Defendants do not

dispute that Plaintiffs have a liberty interest in freedom from unreasonable restraint. They argue, however, that the decision by DMHDD to suspend the passes did not constitute an unreasonable restraint on Plaintiffs' movement.

Supreme Court has recognized that "freedom from bodily restraint has always been the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 112 S.Ct. 1780, 1785 (1992). This liberty interest in freedom from bodily restraint survives involuntary commitment. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). This interest is not absolute; there are occasions when the state has a legitimate interest in restraining the

movement of individuals placed in its institutions. *Id.* at 320. In seeking to balance these interests, an individual's liberty interest must be weighed against the state's asserted reasons for restraining liberty. *Id.* Supreme Court has established that the appropriate standard to apply in balancing these two interests is whether professional judgment was exercised prior to the restraint. *Id.* at 324.

The right of an institutionalized inmate to freedom from unnecessary restraint was articulated by the Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the mother of a profoundly retarded adult filed suit against the state institution in which her son was confined, claiming that the

state defendants had infringed her son's constitutional rights to safe conditions of confinement, freedom from bodily restraint, and training. *Id.* at 309, 310. Plaintiff asserted, specifically, that her son's right to be free from bodily restraint was violated when institution staff restrained him by applying what the Court referred to as "soft" restraints to his arms. *Id.* at 311.

The *Youngberg* Court recognized the right to freedom from bodily restraint and established that this right "must also survive involuntary confinement." *Id.* at 316. Court then articulated a standard to balance this liberty interest against legitimate state concerns for public safety and effective

treatment. Under this standard, the Court concluded, the state "may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training." *Id.* at 324.

Defendants insist that *Youngberg* does not control the outcome here. They note that *Youngberg* involved actual physical restraint; here, Defendants' action only imposes limitations on Plaintiffs' movement within the institution. Defendants correctly observe the degree of physical restraint was more severe in *Youngberg* than in the present case. They err, however, in assuming that the Supreme Court's holding in *Youngberg* hinged upon the

unique degree of physical restraint in that case. The Supreme Court's recent opinion in *Foucha v. Louisiana*., 112 S.Ct. 1780 (1992), demonstrates that the right to liberty from bodily restraint means more than simply a prohibition against actual physical restraint of the body.

In *Foucha*, petitioner had been acquitted of aggravated battery and illegal discharge of a firearm by reason of insanity. He was committed to a psychiatric hospital pursuant to Louisiana law. Four years later, a hospital review committee recommended that he be conditionally discharged. Two court-appointed doctors refused to certify that plaintiff was no longer dangerous, however, and the state trial

court denies his release. This result comported with Louisiana law which required that a defendant found not guilty by reason of insanity be committed to a psychiatric hospital until he can prove that he is not dangerous, regardless of the current diagnosis of his mental condition. 112 S.Ct. at 1781.

The Supreme Court struck down the Louisiana statute as unconstitutional. 112 S.Ct. at 1787. A majority of the Court concluded that the statute violated the Sue Process Clause because it allowed an insanity acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any

mental illness. *Id*. In so holding, the Court recognized that freedom from bodily restraint is a liberty interest that applies to insanity acquittees, *Id*. at 1785 *(citing Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)), and that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Id*. at 1785, (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)). Thus, Plaintiffs enjoy a liberty interest in freedom of movement that need not be limited to freedom from actual physical restraint of the body.

Further support for Plaintiffs' argument that they have a liberty interest in freedom of bodily movement is provided by the Seventh Circuit's

decision in *Johnson v. Brelje*, 701 F.2d at 1201.[10] In addition to arguing that they had an interest in receiving treatment in the "least restrictive environment," plaintiffs in *Johnson* argued that they had a liberty interest in freedom of movement. Plaintiffs attached the DMHDD's practice of confining them indoors except on rare occasions. *Id.* at 1208. Citing *Youngberg*, the *Johnson* court held that the plaintiffs "retain liberty interests in freedom from such restraints [confinement indoors]." *Id.*

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[10] Although the Seventh Circuit in *Maust* overruled *Johnson's* discussion of Section 2-102 and the "least restrictive environment," *Johnson's* consideration of the restrictions that DMHDD placed on forensic patients' freedom of movement remains good law.

Plaintiffs clearly have a constitutionally protected liberty interest in freedom of movement. Plaintiffs must also establish, however, that the DMHDD's suspension of their passes constituted a violation of that liberty interest. This determination requires a balancing of Plaintiffs' liberty interest in freedom of movement against DMHDD's legitimate interest in restraining their movement for the safety of Plaintiffs themselves and the general public. In balancing these interests, *Youngberg* directs that the court make certain that DMHDD exercises professional judgement in deciding that restraint of Plaintiffs through suspension of their passes is necessary to assure safety. 457 U.S. 324.

DMHDD suspended Plaintiffs' passes on May 30, 1990 after two forensic patients used their unsupervised grounds passes to escape from Elgin. In a memo written to all of the state court judges who had approved passes, Defendant Brelje explained that the Department was temporarily suspending all unsupervised grounds passes pending the completed construction of a security fence. Dr. Brelje explained that utilization of the passes under existing conditions "presented an unacceptable danger, both to the individual recipients and the community at large." (Defendants' Response to Plaintiff's Motion for Preliminary Injunction, Ex. E.) Plaintiffs emphasize that one of these escapees was apprehended quickly and the

other had warned Elgin staff of his intention to flee prior to his escape. Further Plaintiffs have presented statistical data which they believe demonstrated there had been no increase in the number of NGRIs or USTs escaping from confinement during exercise of pass privileges over many months prior to May 1990. Nevertheless, for purposes of the preliminary injunction proceeding, this court will assume that DMHDD's initial suspension of the passes was reasonable because a professional decision (albeit not an individualized one) was made that restricting Plaintiffs' freedom of movement promoted legitimate safety concerns.

By March 1991, however, a security fence completely enclosed the forensic

unit. Once the security fence was completed, continued suspension of Plaintiffs' passes no longer represented a reasonable restriction on Plaintiffs' freedom of movement. As early as July 1990, Department staff had made written recommendations to the Circuit Court that Plaintiffs Manos and Nelson (and other forensic patients) have their pass privileges restored upon the completion of the fence. After the fence was built, however, Plaintiffs' pass privileges were not restored. This unnecessary restriction of Plaintiffs' movement is precisely the type of arbitrary state action that the Due Process Clause was intended to prevent. Department staff did, as required by *Youngberg*, make a professional

determination that Plaintiffs should have their passes restored. But the Department never did restore them. Defendants provide no rational explanation why Plaintiffs should not now enjoy the same freedoms they had prior to the suspension of pass privileges. Prior to the original issuance of passes, the Department completed a three-tier determination that Plaintiffs Nelson and Manos did not present a security threat to themselves or the public.[11] Further the Department's release of Manos and its recommendation that Nelson be

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[11] As described in paragraph 5 of the Findings of Fact, *supra*, before a forensic patient receives a pass, the patient's treatment team, Dr. Marquez, and Roalda Alderman must determine that the patient is not a security risk.

conditionally released to a half-way house demonstrate that the Department itself recognizes that both Manos and Nelson can responsibly exercise freedom. The Department's failure to restore Plaintiffs' passes after the completion of the fence unreasonably restricted Plaintiffs' liberty interest in freedom of movement.

B. Were Plaintiffs Deprived of Their Liberty Interest Without Adequate Due Process Protection?

The second step in examining Plaintiffs' "likelihood of success" is to determine whether Defendants afforded Plaintiffs adequate due process protection of their liberty interest in the passes. Due process is "a flexible concept that varies with the particular situation." *Zinermon v. Burch*, 494 U.S.

113, 127 (1990). A court must weigh several factors to determine what procedural protections are required in a particular case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, an the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In applying this test, the Supreme Court "usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon*, 494 U.S. at 127.

1. **Plaintiffs' Interest**

Plaintiffs have a substantial private interest in their passes. For Plaintiffs, the reasonable freedom of movement enjoyed by the passes constitutes a liberty interest , which "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha* , 112 S.Ct. at 1785.

Additionally, all of the potential Plaintiffs suffer from debilitating mental illness. The extent of Plaintiffs' suffering is such that they have been adjudicated either unfit to stand trial or incapable of forming criminal intent. Plaintiffs argue that their passes constitute a form of therapeutic treatment and that

suspension of those passes detrimentally affects Plaintiffs' well-being and recovery. Specifically, they argue that Defendants' program allowing increasingly greater freedoms -- referred to by mental health professionals as "progressive liberties" -- is itself a recognized form of treatment.

Defendants challenge the notion that progressive liberties are necessary or required for effective mental health care. They contend no empirical data supports a conclusion that progressive liberties accelerate a patient's progress. Dr. Brelje testified in fact, that it may be that allowing patients increasing freedoms over a period of several months actually slows the pace

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analysis requires an examination of "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards." 424 U.S. at 355. As previously discussed, Plaintiffs' liberty interest in their passes outweighed Defendants' claimed security needs, at the latest after the fence was built. Thus, the procedures employed by Defendants in determining whether to restore Plaintiffs' passes after construction of the fence must be examined in order to assess the risk that Plaintiffs were erroneously denied pass privileges.

As noted earlier, Defendants appear to have failed to act upon their own

recommendation that pass privileges be restored upon completion of construction of the fence. Not only did Defendants bar Plaintiffs from wandering the full range of the Elgin facility, as they had prior to May 1990; but Defendants also have not allowed patients having unsupervised grounds passes to walk without supervision for more than five minutes, even within the fenced area. Consequently, Defendants' procedures erroneously denied Plaintiffs their liberty interest.

The second prong of the *Mathews* analysis also requires a determination of "the probable value, if any, of additional or substitute procedures safeguards." *Id.* at 335. Plaintiffs here request that prior to any future

suspension of pass privileges, a qualified professional make an individualized determination that the patient no longer meets the criteria for a pass. In case of an emergency, Plaintiffs propose that Defendants be entitled to suspend a pass without a prior determination, as long as that determination is made promptly after the suspension.

The circumstances of Plaintiffs Nelson and Manos demonstrate the probable value of requiring Defendants to make a pre-deprivation individual determination that a plaintiff no longer qualifies for a pass. On May 30, 1990, Defendants suspended the passes of Nelson and Manos without having made such a determination. After conducting

a professional individualized determination only two months later, however, Defendants' decided that Plaintiffs Nelson and Manos should have their passes restored. Had Defendants based their initial decision on an individualized review of Plaintiffs' treatment needs, Plaintiffs Nelson and Manos might never have lost their passes.

3. **Government's Interest**

The third prong of the *Mathews* analysis required that the probable value of any additional safeguards be weighed against "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail." *Id.* Defendants here argue that adoption of Plaintiffs' suggestions would require burdensome and expensive hearing prior to any decision to suspend passes.

Defendants' argument fails to acknowledge, however, that an appropriate mechanism for conducting a pre-deprivation hearing already exists. Paragraph 1005-2-4(b) of the Criminal Code, Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b), requires Defendants to submit a individualized treatment plan to the Circuit Court for each forensic patient every 60 days. Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b). Since ¶ 1005-2-4(b) already requires Defendants to conduct a professional individualized determination before suspending a

Plaintiff's pass privileges, Defendants incur no additional cost or burden in providing a pre-deprivation hearing.

Significantly, Plaintiffs' request for an individual determination imposes a lesser procedural burden on the Department than the requirement which the Seventh Circuit recently imposed on the Wisconsin prison system in *Felce v. Fiedler*, _____ F.2d _____, No. 91-3488, 1992 WL 221989 (7th Cir. Sept. 15, 1992). In *Felce*, a mandatory parolee argued that Wisconsin cannot condition mandatory release parole on forced injections of antipsychotic drugs unless the drugs are necessary and a fair procedure is used to determine such a necessity. 1992 WL 221989, at *3. The *Felce* court held that a parolee has a

liberty interest "in being free from the involuntary use of antipsychotic drugs during his period of mandatory parole." *Id.* at *10. After determining that plaintiff had a liberty interest in refusing medication, the court considered what procedural protections were necessary to protect the liberty interest. The court determined "that the involvement of an independent decisionmaker [in deciding whether the antipsychotic medication was necessary] would benefit significantly the protection of the liberty interest at stake without a significant burden upon . . . the state . . . . *Id.* at *10. In contrast to the request in *Felce*, Plaintiffs here are not requesting that Defendants be forced to supply an

independent decisionmaker in determining whether Plaintiffs qualify for pass privileges. Instead, Plaintiffs merely ask that the pass privilege determinations be made by the same persons who are involved in their day-to-day treatment and who are required to develop individual treatment plans every 60 days.

Conceivably, an emergency could arise prior to the required 60-day hearing that would necessitate the suspension of pass privileges without a prior individualized determination. But even in such an emergency, due process requires the provision of some kind of a hearing as soon as practical after the deprivation has occurred. *Parratt v. Taylor* 451 U.S. 527, 538 (1981). Thus,

in the event Defendants are forced to impose an emergency suspension of pass privileges, due process requires that Defendants conduct an individualized determination within the next 60-day interval.

C. **Remaining Preliminary Injunction Requirements**

As Plaintiffs have demonstrated they are likely to succeed on the merits of their due process claim, the court must consider whether the other requirements for granting of preliminary injunctive relief have been met. Specifically, Plaintiffs must demonstrate that they are likely to suffer irreparable harm for which they have no adequate remedy at law if injunctive relief is denied; that the

harm they will suffer is greater than the burden that injunctive relief would impose on Defendants; and that such relief will not jeopardize the public interest. *Faheem-El v. Klincar*, 841 F.2d 712, 716 (7th Cir. 1988). Defendants have raised no genuine objection to any of the remaining elements of the required showing.

Plaintiffs easily meet the first of these requirements, establishing that if the injunction is denied, they will suffer irreparable harm for which they have no adequate remedy at law. *Faheem-El*, 841 F.2d at 716. Depriving Plaintiffs of their passes is likely to inflict irreparable harm. Because Plaintiffs received their passes after Defendants' determination that the

passes constituted an appropriate part of Plaintiffs' individual treatment plans to provide adequate and humane care, Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b) and ch. 91.5, ¶ 2-102, any deprivation of Plaintiffs' passes may interfere with Plaintiffs' treatment. Since Plaintiffs cannot be released until they recover, Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(h), inteference with their treatment resulting from the suspension of passes may prolong their confinement.

Additionally, Plaintiffs do not have an adequate remedy at law for the irreparable harm that deprivation of their passes may inflict upon them. Monetary damages, for example, will be difficult to calculate. Nor can such

damages make Plaintiffs "whole," if the suspension of passes does interfere with Plaintiffs' treatment and delay recovery. Although Plaintiffs did request an award of damages,[12] it would be difficult to set a price tag on the satisfaction Plaintiffs felt upon learning that their passes would entitle them to some degree of freedom of movement or the disappointment they experienced when their freedom was suspended.

Next, Plaintiffs must establish that denial of the injunction would

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[12] Plaintiff Manos contends he is entitled to an award for pay he lost as a result of his inability to work as a forklift operator, but the evidence did not permit a finding on this issue. Manos did not recall whether he was working in that job at the time of the pass suspension.

inflict greater suffering on them than the burden such relief, if granted, would impose on Defendants. *Faheem-El*, 841 F.2d at 716. Defendants do not dispute that Plaintiffs have met this burden. If the injunction is granted, Defendants will return to the practice they followed prior to the supervision of passes on May 30, 1990. Every 60 days, Defendants will be required to make individual determinations regarding each patient's qualifications for receiving a pass. On the other hand, denial of the injunction threatens harm to Plaintiffs. The passes are part of their treatment plan, and Plaintiffs' recovery and eventual release from DMHDD may be delayed if the pass privileges are not restored.

Finally, Plaintiffs must establish that the injunction will not disserve the public interest. *Id*. Defendants argue that if the passes are restored, public safety will be at risk. Defendants have already discharged Manos, however, and have recommended Nelson for conditional release to a half-way house. These determinations demonstrate that Defendants no longer regard Plaintiffs Nelson and Manos as threats to public safety. Moreover, Illinois law and Department practice contemplate the use of passes as a form of treatment. *See* Ill. Rev. Stat. ch. 38, ¶ 1005-2-4(b). Restoration of the passes may enhance Plaintiffs' treatment; and the injunctive relief they have requested will not disserve

the public interest.

CONCLUSION

Defendants' suspension of Plaintiffs' pass privileges on May 30, 1990 violated Plaintiffs' constitutionally protected liberty interest in freedom from unreasonable restraint on bodily movement. The court should grant Plaintiffs' motion for a preliminary injunction requesting issuance of an order restoring all passes suspended on May 30, 1990 and requiring an individualized professional determination prior to any future suspension of the passes.

ENTER:

_____

REBECCA R. PALLMEYER
United States Magistrate Judge

Date: September 30, 1992

Within ten days of the date of service of this report, Plaintiffs are directed to submit to the Honorable John A. Nordberg their proposed form preliminary injunction order consistent with this Report. Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable John A. Nordberg. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

730 ILCS 5/5-2-4. Proceedings After Acquittal by Reason of Insanity

(a) After a finding or verdict of not guilty by reason of insanity under Sections 104-25, 115-3 or 115-4 of The Code of Criminal Procedure of 1963, the defendant shall be ordered to the Department of Mental Health and Developmental Disabilities for an evaluation as to whether he is subject to involuntary admission or in need of mental health services. The order shall specify whether the evaluation shall be conducted on an inpatient or outpatient basis. If the evaluation is to be conducted on an inpatient basis, the defendant shall be placed in a secure setting unless the Court determines that there are compelling reasons why such placement is not necessary. After the evaluation and during the period of time required to determine the appropriate placement, the defendant shall remain in jail. Upon completion of the placement process the sheriff shall be notified and shall transport the defendant to the designated facility.

The Department shall provide the Court with a report of its evaluation within 30 days of the date of this order. The Court shall hold a hearing as provided under the Mental Health and Developmental Disabilities Code to determine if the individual is: (a) subject to involuntary admission; (b) in need of mental health services on an inpatient basis; (c) in need of mental health services on an outpatient basis;

(d) a person not in need of mental health services. The Court shall enter its findings.

If the defendant is found to be subject to involuntary admission or in need of mental health services on an inpatient care basis, the Court shall order the defendant to the Department of Mental Health and Developmental Disabilities. The defendant shall be placed in a secure setting unless the Court determines that there are compelling reasons why such placement is not necessary. Such defendants placed in a secure setting shall not be permitted outside the facility's housing unit unless escorted or accompanied by personnel of the Department of Mental Health and Developmental Disabilities or with the prior approval of the Court for unsupervised on-grounds privileges as provided herein. If the defendant is found to be in need of mental health services, but not on an inpatient care basis, the Court shall conditionally release the defendant, under such conditions as set forth in this Section as will reasonably assure the defendant's satisfactory progress in treatment or rehabilitation and the safety of the defendant or others. If the Court finds the person not in need of mental health services, then the Court shall order the defendant discharged from custody.

(1) Definitions: For the purposes of this Section:

(A) "Subject to involuntary admission" means: A defendant has been

found not guilty by reason of insanity; and

(i) who is mentally ill and who because of his mental illness is reasonably expected to inflict serious physical harm upon himself or another in the near future; or (ii) who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm.

(B) "In need of mental health services on an inpatient basis means: a defendant who has been found not guilty by reasons of insanity who is not subject to involuntary admission but who is reasonably expected to inflict serious physical harm upon himself or another and who would benefit from inpatient care or is in need of inpatient care.

(C) "In need of mental health services on an outpatient basis" means: a defendant who has been found not guilty by reasons of insanity who is not subject to involuntary admission or in need of mental health services on an inpatient basis, but is in need of outpatient care, drug and/or alcohol rehabilitation programs, community adjustment programs, individual, group, or family therapy, or chemotherapy.

(D) "Conditional Release" means: the release from the custody of either the Department of Mental Health and Developmental Disabilities or the custody of the Court of a person who has been found not guilty by reasons of insanity under such conditions as the court may

impose which reasonably assure the defendant's satisfactory progress in treatment or habilitation and the safety of the defendant and others. The Court shall consider such terms and conditions which may include, but need not be limited to outpatient care, alcoholic and drug rehabilitation programs, community adjustment programs, individual, group, family, and chemotherapy, periodic checks with the legal authorities and/or the Department of Mental Health and Developmental Disabilities. The person or facility rendering the outpatient care shall be required to periodically report to the Court on the progress of the Defendant. Such conditional release shall be for a period of five years, unless the defendant, the person or facility rendering the treatment, therapy, program or outpatient care, or the State's attorney petitions the Court for an extension of the conditional release period of an additional three years. Upon receipt of such a petition, the Court shall hold a hearing consistent with the provisions of this paragraph (a) and paragraph (f) of this Section, shall determine whether the defendant should continue to be subject to the terms of conditional release, and shall enter an order either extending the defendant's period of conditional release for a single additional three year period or discharging the defendant. In no event shall the defendant's period of conditional release exceed eight years. These provision for extension of conditional release shall only apply to defendants conditionally released on or after July 1, 1979. However the

extension provisions of this amendatory Act of 1984 apply only to defendants charged with a forcible felony.

(b) If the Court finds the defendant subject to involuntary admission or in need of mental health services on an inpatient basis, the admission, detention, care treatment or habilitation, review proceedings, and discharge of the defendant after such order shall be under the Mental Health and Developmental Disabilities Code, except that the initial order for admission of a defendant acquitted of a felony by reasons of insanity shall be for an indefinite period of time. Such period of commitment shall not exceed the maximum length of time that the defendant would have been required to serve, less credit for good behavior, before becoming eligible for release had he been convicted of and received the maximum sentence for the most serious crime for which he has been acquitted by reasons of insanity. The Court shall determine the maximum period of commitment by an appropriate order. During this period of time, the defendant shall not be permitted to be in the community in any manner, including but not limited to off-grounds privileges, with or without escort by personnel of the Department of Mental Health and Developmental Disabilities, unsupervised on-grounds privileges, discharge or conditional or temporary release, except by a plan as provided in this Section. In no event shall a defendant's continued unauthorized absence be a basis for discharge. Not more than 30 days after

admission and every 60 days thereafter so long as the initial order remains in effect, the facility director shall file a treatment plan with the court. Such plan shall include an evaluation of the defendant's progress and the extent to which he is benefiting from treatment. Such plan may also include unsupervised on-grounds privileges, off-grounds privileges (with or without escort by personnel of the Department of Mental Health and Developmental Disabilities), home visits and participation in work programs, but only where such privileges have been approved by specific court order, which order may include such conditions on the defendant as the Court may deem appropriate and necessary to reasonably assure the defendant's satisfactory progress in treatment and the safety of the defendant and others.

(c) Every defendant acquitted of a felony by reason of insanity and subsequently found to be subject to involuntary admission or in need of mental health services shall be represented by counsel in all proceedings under this Section and under the Mental Health and Developmental Disabilities Code.

(1) The court shall appoint as counsel the public defender or an attorney licensed by this State.

(2) Upon filing with the court of a verified statement of legal services rendered by the private attorney appointed pursuant to paragraph (1) of this subsection, the court shall

determine a reasonable fee for such services. If the defendant is unable to pay the fee, the court shall enter an order upon the State to pay the entire fee or such amount as the defendant is unable to pa from funds appropriated by the General Assembly for that purpose.

(d) When the facility director determines that:

(1) the defendant is no longer subject to involuntary admission or in need of mental health services on an inpatient basis; and

(2) the defendant may be conditionally released because he or she is still in need of mental health services or that the defendant may be discharged as not in need of any mental health services; or

(3) the defendant no longer requires placement in a secure setting; the facility director shall give written notice to the Court, State's Attorney and defense attorney. Such notice shall set forth in detail the basis for the recommendation of the facility director, and specify clearly the recommendations, if any, of the facility director, concerning conditional release. Within 30 days of the notification by the facility director, the Court shall set a hearing and make a finding as to whether the defendant is:

(i) subject to involuntary admission; or

(ii) in need of mental health services in the form of inpatient care;

or

(iii) in need of mental health services but not subject to involuntary admission or inpatient care; or

(iv) no longer in need of mental health services; or

(v) no longer requires placement in a secure setting.

Upon finding by the Court, the Court shall enter its findings and such appropriate order as provided in subsection (a) of this Section.

(e) A defendant admitted pursuant to this Section, or any person on his behalf, may file a petition for transfer to a non-secure setting within the Department of Mental Health and Developmental Disabilities or discharge or conditional release under the standards of this Section in the court which rendered the verdict. Upon receipt of a petition for transfer to a non-secure setting or discharge or conditional release, the court shall set a hearing to be held within 30 days. Thereafter, no new petition may be filed for 60 days without leave of the court.

(f) The court shall direct that notice of the time and place of the hearing be served upon the defendant, the facility director, the State's Attorney, and the defendant's attorney. If requested by either the State or the defense or if the Court feels it is appropriate , an impartial examination of the defendant by a psychiatrist or clinical psychologist as defined in Section 1-103 of the Mental Health and

Developmental Disabilities Code who is not in the employ of the Department of Mental Health and Developmental Disabilities shall be ordered, and the report considered at the time of the hearing.

(g) The findings of the court shall be established by clear and convincing evidence. The burden of proof and the burden of going forth with the evidence rest with the State when a hearing is held to review the determination of the facility director that the defendant should be transferred to a non-secure setting, discharged or conditionally released. The burden of proof and the burden of going forth with the evidence rest on the defendant when a hearing is held to review a petition filed by or on behalf of such defendant. The evidence shall be presented in open court with the right of confrontation and cross-examination.

(h) If the court finds that the defendant is no longer in need of mental health services it shall order the facility director to discharge the defendant. If the Court finds that the defendant is in need of mental health services, and no longer in need of inpatient care, it shall order the facility director to release the defendant under such conditions as the Court deems appropriate and as provided by this Section. Such conditional release shall be imposed for a period of five years and shall be subject to later modification by the court as provided by this Section. If the court finds that

the defendant is subject to involuntary admission or in need of mental health services on an inpatient basis, it shall order the facility director not to discharge or release the defendant in accordance with paragraph (b) of this Section.

(i) If within the period of the defendant's conditional release, the court determines, after hearing evidence, that the defendant has not fulfilled the conditions of release, the court shall order a hearing to be held consistent with the provision of paragraph (f) and (g) of this section. At such hearing, if the court finds that the defendant is subject to involuntary admission or in need of mental health services on an inpatient basis, it shall enter an order remanding him or her to the Department of Mental Health and Developmental Disabilities or other facility. If the defendant is remanded to the Department of Mental Health and Developmental Disabilities, he or she shall be placed in a secure setting unless the court determines that there are compelling reasons that such placement is not necessary. If the court finds that the defendant continues to be in need of mental health services but not on an inpatient basis, it may modify the conditions of the original release in order to reasonably assure the defendant's satisfactory progress in treatment and his or her safety and the safety of others. In no event shall such conditional release be longer than eight years. Nothing in this Section shall limit a court's contempt powers or any

other powers of a court.

(j) An order of admission under this Section does not affect the remedy of habeas corpus.

(k) In the event of a conflict between this Section and the Mental Health and Developmental Disabilities Code or the Mental Health and Developmental Disabilities Confidentiality Act, the provision of this Section shall govern.

(l) This amendatory Act shall apply to all persons who have been found not guilty by reasons of insanity and who are presently committed to the Department of Mental Health and Developmental Disabilities.

(m) The Clerk of the court shall, after the entry of an order of transfer to a non-secure setting of the Department of Mental Health and Developmental Disabilities or discharge or conditional release, transmit a certified copy of the order to the Department of Mental Health and Developmental Disabilities, and the sheriff of the county from which the defendant was admitted. In cases where the arrest of the defendant or the commission of the offense took place in any municipality with a population of more than 25,000 persons, the Clerk of the court shall also transmit a certified copy of the order of discharge or conditional release to the proper law enforcement agency for said municipality provided the municipality has requested

such notice in writing.